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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EDWARD LONEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Were Petitioner's Fourth Amendment rights violated when federal agents conducted a warrantless search of his wallet several hours after it had been seized from him incident to arrest and reduced to the agent's exclusive control.**

II. **Were Petitioner's Fourth Amendment rights violated when federal agents analyzed, without a warrant, the contents of a bottle seized from his van.**

III. **Was Petitioner denied due process of law and the right of confrontation when the District Court admitted statements of his alleged co-conspirator without independent non-hearsay evidence of the existence of the conspiracy and Petitioner's participation therein.**

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 16, 1982 and reconsideration thereof was denied on May 10, 1982. This Court's jurisdiction is invoked pursuant to the provisions of Title 28, U.S. Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule of Criminal Procedure 104(a):

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule of Criminal Procedure 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule of Criminal Procedure 801(d)(2)(E):

> (d) Statements which are not hearsay. A statement is not hearsay if— . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . .
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

HISTORY OF THE CASE

The indictment herein charged Petitioner LONEY with conspiring to distribute methamphetamine on October 29, 1981, and with distributing same on that date, in violation of 21 U.S.C. §841 and §846, (A12-13).

After denial of LONEY'S pre-trial Motion to Suppress, (A14), a jury trial resulted in a hung jury. LONEY thereafter moved to dismiss the indictment on double jeopardy grounds and because evidence exculpatory to him had been destroyed. The District Court denied the motion and LONEY appealed pre-trial to the Court of

Appeals, (#80-1485). On September 16, 1981, a Judgment Order was entered by the Court of Appeals affirming the judgment of the District Court on the first issue and dismissing the appeal as to the second issue for lack of jurisdiction. A Petition for Writ of Certiorari was denied by this Court on November 17, 1980. (#80-619).

Thereafter, LONEY was retried and convicted of both offenses. Post-trial motions were timely filed, (A15-16), and denied, (A24-28). On April 28, 1981, LONEY was sentenced to five years' imprisonment on each count to run concurrently. LONEY timely appealed the Judgment of Sentence to the Court of Appeals for the Third Circuit. On February 16, 1982, the Court of Appeals entered an Order affirming the Judgment of the District Court, (A1-2).

On March 2, 1982, LONEY filed a Petition for Rehearing and Suggestion for Rehearing En Banc, (A6-7). While the petition was pending, counsel sought by way of letter dated March 12, 1982, (A10), to advise the Court of Appeals of the pendency of *United States v. Ross*, No. 80-2209, before this Court, inasmuch as it appeared (and continues to appear) that the Court's opinion in that matter will have direct bearing upon the Fourth Amendment issues raised in LONEY'S appeal. By order dated March 15, 1982, the Court of Appeals denied rehearing (A11). On March 19, 1982, LONEY filed a Suggestion for Rehearing or Rehearing En Banc Based on Pendency of Controlling Case Argued Before Supreme Court on March 1, 1982, since the Court of Appeals did not have the opportunity to consider counsel's letter of May 12, 1982, before entering its Order on March 15, 1982 denying rehearing. On May 10, 1982, the Court of Appeals again denied rehearing (A3).

STATEMENT OF FACTS

The government presented a case of circumstantial evidence against LONEY; no witness testified under oath as to personal knowledge or direct observation of LONEY'S involvement in the offenses charged.

JOSEPH PELLIGRINI, a paid government informant, testified that on the morning of October 29, 1979, he arranged to purchase two ounces of methamphetamine from JOAN BAISCH, who phoned the order into "Eddy" using a number she had gotten from a circular for "Ed's Steaks". She told PELLIGRINI that "Eddy" would bring the drugs later that day. PELLIGRINI gave her $2,400.00 (in marked money) to make the buy. During the day, PELLIGRINI contacted BAISCH several times and was told the drugs were on the way. The house was kept under surveillance during the entire day by DEA Agents. LONEY, who had also been kept under surveillance all day, eventually entered BAISCH'S residence, stayed about ten minutes and left. After LONEY was seen leaving, PELLIGRINI again went into the house and obtained the drugs from BAISCH, at which time she asked him if he had seen "Eddy" leave.

When the deal between BAISCH and PELLIGRINI had been completed, Agents at the scene radioed other agents following LONEY; LONEY'S vehicle was then stopped and he was arrested.

A search incident to the arrest resulted in the seizure from LONEY'S person of $2000 of the marked $2400 used in the drug purchase and an unmarked gallon bottle of liquid from the vehicle, (A18-19). LONEY was taken into custody, and his wallet, papers and other personal effects were retained by the agents. BAISCH was arrested in her house, at which time she was found to be in possession of a small quantity of methamphetamine and the remaining $400 in marked bills. Later that evening, after LONEY was securely in custody, the case agent went through his wallet looking for "intelli-

gence", (A22), and found several pieces of paper containing chemical names and formulae, (A19). The next day, he removed some shredded tin foil from the floor of the vehicle, (A19).

At trial, a government witness was permitted to testify over defense objection that the bottle contained P2P and that P2P was used in the manufacture of methamphetamine. He further testified that one of the chemical formulae found in LONEY's wallet was for P2P, and that another formula was for a chemical that was also used in the manufacture of methamphetamine, as was shredded tin foil.

REASONS FOR GRANTING THE WRIT

I. Petitioner's Fourth Amendment rights were violated when federal agents conducted a warrantless search of his wallet several hours after it had been seized from him incident to arrest and reduced to the agent's exclusive control.

The Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967); more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy. In *United States v. Chadwick*, 433 U.S. 1, (1977), this Court held that the expectation of privacy reasonably extended to a footlocker seized incident to arrest, and in *Arkansas v. Sanders*, 442 U.S. 753 (1979), held that such protection extended to the contents of an unlocked suitcase seized from an automobile at the time of arrest.

The factual situation in this case is similar to that in *Chadwick*, supra. There, federal agents arrested suspected drug couriers at a train station on the basis of probable cause to believe their foot locker contained marijuana, and took the suspects and the locker to their office where they searched it without a warrant and without any exigent circumstances calling for an imme-

diate search. The Supreme Court held that the warrantless search violated the Fourth Amendment Warrant Clause, saying:

> "However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest.' *Preston v. United States*, 376 U.S., at 367, 84 S.Ct., at 883, or no exigency exists . . . Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency . . . In our view, when no exigency is shown to support the need for an immediate search the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." 433 U.S., at 2485-2486

Here, the government seeks to distinguish *Chadwick* on the ground that the wallet is not "luggage" as defined in the context of that case. No less than luggage is a person's wallet intended as a repository of personal effects. Certainly, possessions carried in a wallet on the person are due no less protection by the Fourth Amendment Warrant Clause than those placed in a footlocker, *United States v. Chadwick*, supra; a suitcase, *Arkansas v. Sanders*, supra; an attaché case, *United States v. Jackson*, 576 F.2d 749 (CA 8, 1978); or a briefcase, *United States v. Schleis*, 582 F.2d 1166 (CA 8, 1978). See *United States v. Marchand*, 564 F.2d 983 (CA 2, 1977); cert. denied, 434 U.S. 1015 (1978), in which the Court held that police must obtain a warrant before opening a wallet found in plain view and extracting a driver's license therefrom. See also *United States v. Jankowski*, 470 F.Supp. 464 (W.D. Pa., 1979).

By placing his papers inside his wallet, LONEY clearly, in the language of *Chadwick*, "manifested an expectation that the contents would remain free from public examination." 433 U.S., at 11. Moreover, LONEY retained personal possession of the wallet, thus manifesting an even greater expectation of privacy then if he had relinquished possession to a common carrier for shipping as in *Chadwick*, or by placing the brief case on the back seat of a motor vehicle, as in *Schleis*.

The government has sought to justify the search of LONEY'S wallet under the rationale of *United States v. Edwards*, 415 U.S. 800 (1974), which permitted a post-arrest seizure of the clothing of an arrestee. In *Edwards*, the Supreme Court approved an evidentiary search at the station house, of clothing which the defendant was still wearing ten hours after his arrest, where the officers had probable cause to believe that the clothing contained evidence of crime, thus rendering it subject to search at the time of his arrest. The government here reasons that the search of LONEY'S wallet would have been proper at the time and place of the arrest and, it was therefore permissible under the standards enunciated in *Edwards*.

Indeed, some of the language in *Edwards* suggests that any items that could be searched at the time of the arrest could be searched at *any* time after the arrest, viz:

> "(O)nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other." 415 U.S., at 807.

However, a close reading of that opinion indicates that the Supreme Court was referring only to searches of

effects still in the defendant's possession and control at the place of detention. See *United States v. Schleis*, supra.

Moreover, two other significant facts distinguish this case from *Edwards:* First, the contents of LONEY'S wallet in police custody were not subject to the same risk of loss as were the paint chips on clothing still being worn by EDWARDS; Second, while there was cause to believe that EDWARDS' clothing contained paint chips from the window through which he had allegedly crawled, there was no reason to believe that LONEY'S wallet contained evidence of crime, since all of the marked money had been retrieved by the time the wallet was searched.

Clearly, *Edwards* is inapposite here and the warrantless search of LONEY'S wallet at a time when he was securely in custody and his wallet in the agent's possession was not justified. *United States v. Benson*, 631 F.2d 1336 (CA 8, 1980); *United States v. Graham*, 638 F.2d 1111 (CA 7, 1981); *United States v. Jankowski*, supra.

The government may look to the Supreme Court's recent decision in *New York v. Belton*, ____ U.S. ____, 29 CrL 3124 (1981), to buttress its argument that the search of LONEY'S wallet was lawful. In that case, the Court upheld the actions of a police officer in seaching the zippered pockets of a jacket found in the passenger compartment of an automobile, contemporaneous with the arrest of the occupants thereof. In actuality, that decision advances LONEY'S position: in holding that closed containers within an arrestee's reach may be searched, the Court made it clear that, in order to be justified as incident to arrest, such searches must be conducted substantially contemporaneous with the arrest, and not at some later point in time.

The application of *Chadwick* and its progeny to the facts of this case leads to the inescapable conclusion that LONEY had a reasonable expectation of privacy in the

contents of his wallet, and that the warrantless search thereof cannot be viewed as incident to this arrest or justified by any other exigent circumstances, and such search was, therefore, a violation of his Fourth Amendment rights, the fruits of which illegal search must be suppressed.[1]

II. Petitioner's Fourth Amendment rights were violated when federal agents analyzed, without a warrant, the contents of a bottle seized from his van.

The determination that probable cause existed for LONEY'S arrest and the search of his vehicle incident thereto is not dispositive of the legality *vel non* of the analysis of the contents of a bottle found in the van. Nor is the permissibility of a warrantless inventory search of the vehicle conclusive as to that issue. *United States v. Chadwick*, supra; *United States v. Bush*, 647 F.2d 357 (CA 3, 1981). Thus, it is necessary to determine whether LONEY had a reasonable expectation of privacy in the contents of the bottle which would have precluded the analysis thereof without a warrant.[2]

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1. The government may attempt to justify the warrantless search herein as a valid inventory search under *South Dakota v. Opperman*, 428 U.S. 364 (1976). However, the record clearly establishes beyond doubt that the officer was seeking intelligence, not inventory; and that no inventory was ever made, (A22). Further, the government's interest in making an inventory could have been accomplished by placing the wallet in a sealed envelope and inventorying same as a unit. There was no necessity to open the wallet to inventory the contents. Accord, *United States v. Schleis*, supra; *United States v. Davis*, 501 F.Supp. 23 (N.D. Ga., 1980).

2. At first blush, it may appear that *New York v. Belton*, supra, defeats LONEY'S argument without regard to the reasonableness of his expectation of privacy in the contents of the bottle. However, that decision has no bearing on the issue here inasmuch as even if the seizure of the bottle was lawful, the agents had no probable cause to believe that the bottle or its contents constituted contraband, fruits or instrumentalities of crime, or evidence thereof, and therefore, there was no reason to make any further search of the bottle. See *Note* 3, infra.

In *Robbins v. California*, ____ U.S. ____, 29 CrL 3115 (1981), the Supreme Court held that the Fourth Amendment protects the contents of any closed container, regardless of the nature thereof, unless its contents are obvious to the observer. Also see *United States v. Ross*, 655 F.2d 1159 (CA D.C., 1981) cert. granted ____ U.S. ____, 30 CrL 4029 (1981). Thus, there can be no doubt that a glass bottle is within the class of protected containers, unless the nature of its contents are revealed thereby.

Here, the bottle was capped and it bore no label. Even though transparent it yielded no information about its contents other than that they were liquid.[3] In this regard, the bottle merits no less protection than a soft suitcase that reveals its contents as solid objects, so long as the shape of the objects do not define their nature. *Robbins v. California*, supra.

Accordingly, regardless of the agents' right to seize the bottle, they had an obligation to obtain judicial authority before searching it, i.e., analyzing the contents thereof, and the fruits of such search should have been suppressed.

III. Petitioner was denied due process of law and the right of confrontation when the District Court admitted statements of his alleged co-conspirator without independent non-hearsay evidence of the existence of the conspiracy and Petitioner's participation therein.

BAISCH'S out-of-court statements were admissible (over Defendant's repeated objections) only if they fall

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3. In its opinion on the suppression issue, the Court found probable cause to seize the bottle based upon, *inter alia*, the agent's professional familiarity with the visual appearance of the chemical P2P. . ." No such testimony was offered at the suppression hearing, however, when the only references to the seizure of the bottle were (1) that "a gallon bottle of liquid was seized from the van", (A20), and (2) that it was found in plain view, (A21).

within the co-conspirator exception embodied in *Federal Rule of Evidence 801(d)(2)(E)*. In order to avail itself of that exception the government must prove, by a preponderance of the evidence independent of the hearsay, that a conspiracy existed *and* that the defendant was a member thereof. *United States v. Continental Group, Inc.*, 603 F.2d 444 (CA 3, 1979); *United States v. Trotter*, 529 F.2d 806 (CA 3, 1976). It is the responsibility of the judge, rather than the jury, to determine whether the government has met its burden. *United States v. Trowery*, 542 F.2d 623 (CA 3, 1976); *Federal Rule of Evidence 104*.

Here, the only conspiracy as to which proof was presented at trial was the conspiracy alleged in the indictment between LONEY and BAISCH to sell drugs to the informant. Thus BAISCH'S statements are admissible only if there was sufficient independent proof of *that* conspiracy.

The non-hearsay evidence introduced against LONEY was that he went to BAISCH'S home shortly before the transfer of drugs took place and that at the time of arrest, he had $2000 of the marked money given to BAISCH by the informant in his possession, (N/T, 1/14/81, pp. 9-30). While this evidence may show that LONEY sold drugs to BAISCH, it gives no indication whatsoever of LONEY'S participation in an agreement to resell those drugs to a third party.[4]

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4. The government may not argue that the independent evidence of an agreement by LONEY and BAISCH to consummate a drug transaction between themselves supports admission of the hearsay, since no joint enterprise is involved in the mere agreement to sell what another agrees to buy. *United States v. Mancillas*, 580 F.2d 1301 (CA 7, 1978). Moreover, such a result flies in the face of the rationale underlying the co-conspirator exception, i.e., by becoming a member of the conspiracy, a person authorizes his co-conspirators to speak on his behalf with regard to matters concerning the conspiracy. In a drug sale, as with any other business transaction, the buyer and seller are, if anything, adversaries, and not agents of each other.

The facts in *United States v. Nelson*, 603 F.2d 42 (CA 8, 1979) provide a pertinent example of the type of independent evidence necessary to establish the participation of the seller of drugs in a conspiracy with his buyer to redistribute those drugs to third parties. In that case, there was evidence that the defendant had sold drugs to one WEBB, who very shortly thereafter resold the drugs to BARTON. The government offered the hearsay statements of alleged co-conspirators, DORSEY, WEBB and BARTON in order to prove a conspiracy between NELSON and WEBB to distribute drugs to BARTON. The alleged co-conspirators testified at trial as follows:

> DORSEY said that he bought heroin from REECE and that he met NELSON at REECE'S apartment and discussed buying heroin from NELSON, in REECE'S presence. DORSEY then began buying heroin from NELSON for his own use and for resale to others, including WEBB and BARTON; WEBB testified that he had bought heroin from REECE and DORSEY for his personal use and for resale to others. Pursuant to NELSON'S request that WEBB sell heroin for him, WEBB began buying heroin from NELSON for his own use and for resale to others, including BARTON who he had met through REECE; BARTON testified that she had met DORSEY and WEBB through REECE and that she had bought heroin from all three of them for her personal use and for resale to others.

Thus, in *Nelson* there was independent evidence not only that NELSON, REECE, DORSEY, WEBB and BARTON were involved in a conspiracy to distribute heroin among themselves, but also that the conspiracy specifically contemplated resale of heroin to others. Indeed, there was an explicit agreement between NELSON and WEBB that WEBB act as a conduit for the resale of NELSON'S heroin. Here, there is no such inde-

pendent evidence of a conspiracy, i.e., there is no indication that LONEY had any concern or interest in BAISCH'S disposition of the drugs allegedly sold by him to her, and BAISCH'S out-of-court statements to that effect should have been excluded.

Even assuming BAISCH'S out-of-court statements were admissible against LONEY under *Federal Rule of Evidence 801(d)(2)(E);* the admission into evidence of such statements clearly deprived LONEY of his Sixth Amendment right of confrontation with regard thereto, as interpreted in *Bruton v. United States*, 391 U.S. 123 (1968). BRUTON specifically left open the question whether or not the co-conspirator exception is violative of the Sixth Amendment right of confrontation, 391 U.S., at 128, n.3. In *Dutton v. Evans*, 400 U.S. 74 (1970), the Court held that the Sixth Amendment permitted the use of such statements if inherently reliable and neither crucial nor devastating to defendant's case. Admissibility under the co-conspirator exception does not, however, automatically demonstrate compliance with the confrontation clause. *United States v. Eaglin*, 571 F.2d 1069 (CA 9, 1977), cert. denied, 435 U.S. 906 (1978).

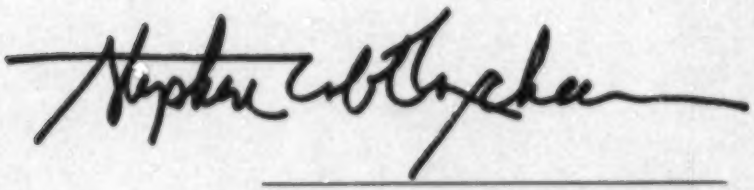
Here, the non-testifying BAISCH was in fact the principal witness against LONEY, insofar as her statements provide the only direct evidence of LONEY'S participation in the offenses charged. Indeed, without those statements the remaining evidence was insufficient to sustain a conviction. *United States v. Mancillas*, 580 F.2d 1301 (CA 7, 1978).

Thus, BAISCH'S out-of-court declarations were crucial to the government's case, and by admission thereof LONEY was deprived of the right to confront the principal witness against him in violation of the Sixth Amendment and, therefore, evidence of BAISCH'S out-of-court statements should have been excluded, as being more prejudicial than probative. *Federal Rule of Evidence 403.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Third Circuit, which affirmed without discussion a Judgment of the United States District Court for the Eastern District of Pennsylvania.

Respectfully Submitted,



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